Supreme Court, U.S.
FILED
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No. 95-819

In The

Supreme Court of the United States

October Term, 1995

ROBERT P. (Anonymous),

Petitioner,

v.

IN THE MATTER OF
JACLYN P. (Anonymous), et al., NASSAU COUNTY
DEPARTMENT OF SOCIAL SERVICES,

Respondent.

**On Petition For Writ Of Certiorari
To The Court Of Appeals
Of The State Of New York**

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should an appellate court have the authority to reverse a trial court on a question of fact after giving deference to the lower court's findings at trial?

2. Is preponderance of the evidence a constitutionally permissible standard in a child abuse proceeding?

LIST OF PARTIES

Jaclyn P. (Anonymous) is the Petitioner's seven year old daughter.

Melissa P. (Anonymous) is the Petitioner's nine year old daughter.

Robert P. (Anonymous) is the Petitioner.

Respondent, Nassau County Department of Social Services, is an agency of the political subdivision of Nassau County, New York.

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STATEMENT OF CASE

On July 5, 1990, petitioner was served with a petition alleging he sexually abused his two daughters. The allegations of abuse were pursued at fact finding only with respect to Melissa. Specifically, it was alleged petitioner engaged Melissa in sexual contact comprising digital penetration of her anus and vagina, touching her breasts and placing his penis inside her mouth. Melissa was three years old at the time of the alleged incidents.

A fact finding hearing was held in Nassau County Family Court and Judge Feiden concluded that the County had not met its burden of proof and dismissed the petition. Specifically, Judge Feiden stated, "It's my finding on the evidence that the allegation of sexual abuse could have happened and it could not have happened and on that basis the evidence was absolutely even and was not – and therefore there was not a preponderance". (App. 26).

The Appellate Division, Second Department, however, reversed Judge Feiden, holding "on balance, our review of the entire record leads us to conclude that the allegations of abuse were established by a preponderance of the credible evidence". (App. 24). The credible evidence relied upon by the Appellate Division consisted of the out-of-court statements by Melissa, expert validation testimony by Yael Layish, a certified social worker, and medical testimony by Dr. Bogard and Dr. Kirschen. The Appellate Division found Ms. Layish's corroborative testimony to be highly reliable, concluded Dr. Bogard's physical findings, while not necessarily indicative of sexual abuse, were consistent with such a finding, and

accepted Dr. Kirschen's opinion that Melissa showed signs consistent with being a victim of sexual abuse. The Appellate Division concluded that the only evidence tending to support a finding that Melissa had not been abused was respondent's denial testimony and the testimony of Dr. Monty Weinstein. (App. 23, 24).

On November 1, 1995, the Court of Appeals affirmed the order of the Appellate Division. New York's highest court concluded that the weight of the evidence more closely comports with the Appellate Division's determination. (App. 3).

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because the petition does not establish any compelling reasons for granting the writ, as required by Rule 10 of the Rules of this Court. Contrary to petitioner's assertions, the decision of the New York Court of Appeals in this matter does not conflict with *United States v. Raddatz*, 447 U.S. 667 (1980), nor *Santosky v. Kramer*, 455 U.S. 745 (1982).

I. New York Appellate Courts Only Reassess Credibility After Giving Deference To The Findings Of The Trial Court And Such Practice Does Not Conflict With *United States v. Raddatz*.

Appellate courts in New York State have the authority to review questions of law and questions of fact on an appeal from a judgment or order of a lower court. *See*

Article VI, section 5, N.Y.S. Constitution; N.Y. Civil Prac. L.&R. section 5501(c). Petitioner maintains that New York appellate courts routinely reassess credibility and such practice violates constitutional due process. (App. 7). Petitioner further maintains that the determination in this case rested squarely on an assessment of credibility and if the appellate court had applied deference to the trial court, the determination of Family Court would have been sustained. (App. 8, 9). Both assertions are factually and legally incorrect.

Petitioner would have this Court believe that appellate courts in New York State routinely reassess the credibility of witnesses without any deference to the trial court's findings. That is simply not the law. The Court of Appeals has consistently held that the findings of the nisi prius court must be accorded the greatest respect. *Eschback v. Eschback*, 56 N.Y.2d 167, 173 (1982); *Matter of Irene O.*, 38 N.Y.2d 776, 777 (1975). Respect and deference to the findings of the lower court is based on the fact that the trial judge has the better opportunity to assess credibility. *Layton v. Foster*, 61 N.Y. 2d 747, 749 (1984). Consequently, petitioner's statements that New York appellate courts routinely reassess credibility without seeing the witnesses is misleading because he failed to advise this Court that such determinations are only made after first giving deference to the trial court's findings.

Interestingly, petitioner cites *Northern Westchester Professional Park Assoc. v. Town of Bedford*, 60 N.Y.2d 492, as authority for the proposition that appellate courts in New York may reverse a determination on the facts, reassess credibility and direct the entry of judgment accordingly, without having seen or heard the witnesses.

(App. 7). Petitioner, however, fails to reveal in that case the Court of Appeals acknowledged such authority only after the appellate court takes into account "the fact that the trial judge had the advantage of seeing the witnesses". *Id.* at 499.

Petitioner further misleads the Court when he states New York appellate courts routinely reassess credibility in manners of this sort. (App. 7). *See Matter of Lauren "KK"*, 175 A.D.2d 393 (3rd Dept. 1991) (no basis for disturbing Family Court's resolution of credibility issue in child sex abuse case); *In re Sharrell B.*, 190 A.D.2d 629 (1st Dept. 1993) (Family Court disposition affirmed upon a finding respondent sexually abused his daughter); *Matter of Brandon "UU"*, 193 A.D.2d 835 (3rd Dept. 1993) (respondent guilty of sexually abusing and neglecting his children and Family Court order affirmed); *Matter of Daryl S.*, 180 A.D.2d 639 (2nd Dept. 1992) (Family Court's finding of abuse affirmed); *In re J.S.*, ___ A.D.2d ___, (1st Dept. 1995) (finding that appellant had sexually abused his daughter was supported by more than the required preponderance of the evidence); *Matter of Kimberly R.*, 178 A.D.2d 531 (2nd Dept. 1991) (validating testimony of a child abuse expert constituted sufficient corroboration of the child's out-of-court statement to support determination of the Family Court); *Matter of Scott "X"*, 184 A.D.2d 866 (3rd Dept. 1992) (Family Court's rejection of respondent's testimony as incredible was within its discretion to make as the finder of fact); *Matter of Linda K.*, 132 A.D.2d 149 (2nd Dept. 1987) (the validation testimony of expert constituted sufficient corroboration and Family Court's decision affirmed); *Swift v. Swift*, 162 A.D.2d 784 (3rd Dept. 1990) (after full review of the trial testimony, we

find no reasons to overturn Family Court's specific crediting of the testimony of respondent).

Petitioner submits that if the Appellate Division had given deference to the findings of the Family Court, the determination of Family Court would have been sustained. (App. 9). This statement is disingenuous because the Appellate Division did give deference to the findings of the Family Court. The Court specifically noted, "Although the determination of the trier of fact is entitled to appropriate deference, in this case we find that the weight of the evidence is so strongly in favor of a finding of sexual abuse that the petition should be sustained (cf., *Matter of Linda E.*, 143 A.D.2d 904). (App. 22). The decision of the Appellate Division applied the deference petitioner claims is constitutionally required. The Court simply held the weight of the evidence strongly supported a finding of sexual abuse. Similarly, the Court of Appeals held the weight of the evidence more closely comports with the Appellate Division's determination. (App. 3).

To suggest this case conflicts with *United States v. Raddatz*, 447 U.S. 667 (1980) is simply erroneous. First, contrary to petitioner's position, the Federal Magistrates Act is not a parallel provision to the New York constitutional and statutory provisions involved in this case. The Federal Magistrates Act permits magistrates to hear certain matters and report to district court judges. The act is similar to New York's judicial hearing officer program (JHO's)[1], not to New York's appellate court system.

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[1] See N.Y.S. session laws, ch. 840, L. 1983; *People v. Scalza*, 76 N.Y.2d 604 (1990) (relying on *Raddatz*, Court of Appeals held JHO system is constitutional).

The alleged serious issue left open in *Raddatz* is contained in a footnote wherein this Court hypothesized that it would be questionable for a district court judge to reject a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal without seeing and hearing the witnesses whose credibility is in question. *Raddatz* at 681 n. 7.

This case does not involve the findings of a JHO or magistrate whose judicial function is to assist the trial judge in reaching a final determination. On the contrary, this case involves appellate review by four New York State Supreme Court justices and seven justices of the Court of Appeals. These judges are constitutionally and statutorily authorized to review the law and facts on appeal. Such review, must give great respect and deference to the findings of the trial judge who actually saw the witnesses. Such deference was given in the present case. Nevertheless, granting deference to a lower court does not, and should not, mean an abrogation of authority. To hold otherwise would render appellate review meaningless. New York's system of appellate review provides adequate due process and in no way conflicts with *United States v. Raddatz*.

II. Preponderance Of The Evidence Is A Constitutionally Permissible Standard In Child Abuse Proceedings.

In *Santosky v. Kramer,* 455 U.S. 745, 747 (1982), this Court held that before a State may sever **completely and irrevocably** the rights of parents in their natural children, due process requires that the State supports is allegations by at least clear and convincing evidence (emphasis added). In the present case, Petitioner never faced complete and irrevocable loss of his parental rights. The maximum initial period of separation from his children was one year.[2] *See* N.Y.S. Family Court Act, section 1055 (b)(i). Furthermore, New York law provides for visitation with the children during the placement. *See* N.Y.S. Family Court Act, section 1055 (c).

In *Matter of Tammie Z.,* 66 N.Y.2d 1 (1985), the New York Court of Appeals articulated in detail the difference between abuse and termination proceedings and why the preponderance of the evidence standard in a child abuse proceeding affords due process under the Federal Constitution. Petitioner submits the Court simply distinguished *Santosky* on the ground that an abuse proceeding is different than a termination case. In reality, the Court held that the balance of interests in an abuse case differ materially from a termination proceeding. *Id.* at 4. Not only did the Court point out that termination denies the natural parent the right to ever visit or communicate with the child

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[2] Petitioner is now prohibited from having contact with his children until they reach the age of 18 years because he refused to engage in court ordered therapy for sex abusers. See, App. 50, 51.

again, the Court highlighted an even more fundamental difference, the fact that an erroneous failure to place a child in an abuse case will result in the return of the child to her abuser. *Id.* at 4. *Matter of Tammie Z., supra,* clearly and thoroughly details why a preponderance of the evidence standard affords adequate due process in a child abuse case. New York's highest court reached this conclusion with the knowledge and understanding of the requirements of procedural due process as articulated by this Court in *Santosky v. Kramer.* Consequently, there is no tension between the standard of proof applied in this case and decisions of this Court.

Petitioner also maintains that New York's standard of proof in child abuse cases conflicts with other states. Some of the cases cited by petitioner to support this proposition, however, were termination proceedings. *In re Smith,* 77 Ohio App. 3d 1, 601 N.E.2d 45 (1991) (order granting permanent custody reversed because evidence adduced did not show clearly and convincingly neglect existed); *In re Interest of D.S.,* 217 Ga. App. 29, 456 S.E. 715 (1995) (only under compelling circumstances, found to exist by clear and convincing proof, may a court sever the parent-child custodial relationship). Another case cited by petitioner, *Matter of Schoffstall,* 179 W. Va. 350, 368 S.E.2d 720 (1988) was an adoption proceeding where the court held the only way it could grant the adoption is by clear and convincing proof the father abandoned or permanently relinquished his parental rights. Nevertheless, some states do require clear and convincing proof in child sex abuse cases. *In re Interest of I.M.B.,* 897 S.W.2d 146 (Mo. App. 1995). The fact some states impose a stricter standard of proof does not mean New York's standard

violates the 14th amendment. The relevant inquiry is what process is due in a child sex abuse case. The test to determine what process is constitutionally due involves the balancing of three factors: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

After considering and weighing each of the three due process factors, New York's courts have correctly concluded that the use of a preponderance of the evidence standard in abuse cases does not offend the due process clause. *Matter of Linda C.*, 86 A.D. 2d 356 (3rd Dept. 1982); *Matter of Tammie Z., supra.* In *Matter of Linda C., supra*, the court specifically noted that the effect of imposing a stricter standard of proof upon the State will make successful prosecution of child protective proceedings more difficult. *Id.* at 361. The crucial state interest of protecting children from the inflection of sexual molestation weighs heavily in the conclusion that New York's standard of proof in child abuse cases is constitutionally permissible. If New York's standard provides adequate procedural due process, then it is irrelevant that the legislatures of some other states have chosen to impose a stricter standard.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

December 22, 1995
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Respectfully submitted,

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